

CHAPTER VII

EMPLOYMENT

Section 4. Retaliation Cases

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## A. Legal Standards for Retaliation Cases

### 1. The Legal Standards

Government Code Section 12940(f) provides that it is unlawful:

(f) For any employer, labor organization or employment agency to discharge, expel or otherwise discriminate against any person because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified or assisted in any proceeding under this part.

The Commission regulations and several decisions (see section C below for a listing of the applicable FEHA) have established the following multi-part legal standards for employment retaliation cases:

#### I. Jurisdiction

To be covered by the FEHA, the complainant's conduct must qualify as one of the following two forms of "protected activity":

- A. "Opposition" to employment practices that are or that the complainant reasonably believes to be in violation of the Act;  
or
- B. "Participation" in any fashion in any investigation, hearing, or other proceeding conducted by the Department or Commission.

#### II. Discrimination

Retaliation exists where the respondent has taken an adverse action of any kind against the complainant because of the complainant's protected activity. If there is a causal link between the protected activity and the adverse action, retaliation has occurred.

#### III. Affirmative Defenses

The respondent may excuse its retaliatory actions if it can demonstrate:

- A. That the complainant's protected activity was disruptive or detrimental to the respondent's legitimate business interests;  
and
- B. That, even if the complainant's protected activity was disruptive or detrimental, the disciplinary steps taken against the complainant were reasonable responses in view of the appropriateness of the complainant's conduct.

#### IV. Remedy

Ordinary remedy standards apply to retaliation cases (see Section 16 of Chapter VII).

## 2. Discussion of the Legal Standards

### a. Jurisdiction Standards (Issue I)

The Commission's broad standard for "protected activities" protects most forms of protests ("opposition"), even general and ambiguous ones, against unlawful employment discrimination. It also protects all forms of access to the FEHA's complaint process ("participation"). However, while the exact boundaries of "protected activities" under the Act are very broad, they are still somewhat undefined. Be sure the complainant's actions fit into one of the two basic categories of "protected activities":<sup>1</sup>

#### 1) Opposition

The FEHA broadly protects most forms of opposition to or protests against practices unlawful under the Act. The Commission regulations and other sources provide several general rules about the coverage of "opposition":

- The "practices" opposed must either exist or reasonably be believed to exist and need not be unlawful under the Act in fact as long as the individual reasonably believes that they are unlawful.
- "Opposition" may be actual or merely perceived by the respondent regardless of the intention of the individual expressing the opposition.
- General protests against discrimination-related, broad societal practices are covered; the practices opposed need not be specific.

The Commission regulations and other legal sources indicate that "opposition" includes but is not limited to the following specific examples:

- Seeking the advice or advising any person to seek the advice of the Department or Commission regardless of whether a complaint is filed or later sustained.
- Complaining to, participating in, or threatening to participate in the proceedings of any other agency, union, or organization regarding employment discrimination.

NOTE: Involvement in the FEHA complaint process is considered "participation" and is discussed below.

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<sup>1</sup>Section 12940(e) of the FEHA (effective 1/1/83) establishes a third category of protected activity; making reports pursuant to Section 11161.8 of the Penal Code. This code section requires hospitals and their employees to report instances of neglect or abuse of patients transferred from a health facility or community care facility (as defined in Sections 1250 and 1502 of the Health and Safety Code, respectively) to both the local police authority having jurisdiction and to the county health department. Cases alleging retaliation for this category of protected activity should be analyzed in the same way as standard retaliation cases.

- Opposition to discrimination by industry in general.
- Protests against discrimination in society in general.
- Association with groups that oppose discrimination.
- Engaging in activities on behalf of a particular minority group, women, or any other protected group.
- Attempts to reform a union's racial practices.
- Questioning of an employer about its employment practices.
- Supporting a co-worker's claim of employment discrimination to supervision or at a board meeting.
- Voicing opposition to discrimination to a newspaper or some other public forum.
- Refusing a supervisor's order to discriminate against an employee or applicant who is a member of a protected group.

## 2) Participation

"Participation" is a narrow category. While "opposition" covers filing with or access to other agencies, "participation" generally only includes involvement with the FEHA's process.

The FEHA broadly protects all "participation" in or access to the FEHA complaint process. The activity to be protected, however, must be based on a good faith belief that the Act has been violated.

The Commission regulations and other legal sources indicate that "participation" includes, but is not limited to, the following specific examples:

- Filing a complaint, contacting, communicating with, testifying, assisting, or participating in any manner in an investigation, proceeding, or hearing conducted by the Department or Commission or their staffs, regardless of whether a complaint is filed or ultimately sustained.
- Involvement as a potential witness which an employer perceives as participation in FEHA proceedings.
- Filing DFEH complaints against former employers.
- Refusing to assist an employer in a DFEH investigation.

In addition, an individual does not have to be an employee in order to have standing to file a complaint. The Act prohibits retaliation against "any person" who engages in "protected activity."

Example:

Complainant, a former employee of Respondent, applies for a job with a different employer. Respondent gives Complainant a poor reference because Complainant filed a DFEH complaint against Respondent. Because of this poor reference, the new employer refuses to hire the Complainant. Even though Complainant is no longer an employee of Respondent, Complainant still has standing to file a retaliation complaint against Respondent.

b. Discrimination Standards (Issue II)

We usually define as "discrimination" those situations where an employer takes an adverse action because of one of the protected "bases" under the FEHA (race, sex, marital status, etc.). The legal standard for retaliation simply plugs "protected activity" into this formula instead of a protected basis. Thus, even though it is not technically discrimination, retaliation is analyzed, under Issue II, in exactly the same way. The basic inquiry is whether there was a causal link between the complainant's protected activity and the adverse action.

In addition to the most familiar types of adverse actions (e.g., termination, failure to hire) an employer may take against a complainant, there are other not-so-familiar adverse actions that commonly occur in retaliation cases: poor evaluations, retaliatory surveillance, poor recommendations for subsequent employment, filing of libel suits against a person because of the allegations in his DFEH complaint, or any action that adversely affects an employee's working conditions or otherwise denies any employment benefit to that employee.

In the precedential decision, Dyna-Med, the Commission resolved the question of how extensive a role retaliation must play in the respondent's motivation in order to show the requisite causal connection between the complainant's "protected activity" and the adverse action. On p. 11, the Commission stated that retaliation need not be the sole or substantial factor or reason for the respondent's adverse action. Even if other non-discriminatory factors also entered into the respondent's decision, the legal standard is still met as long as retaliation was at least a partial factor in motivating the respondent to take the adverse action.<sup>2</sup>

NOTE: If other factors were involved, the respondent may be able to demonstrate that one or more of these factors would still have compelled it to take the adverse action against the complainant even if the respondent had not had a

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<sup>2</sup>This "partial factor" standard applies only to employment cases. The legal standard for showing the "causal connection" under Issue II in housing cases is set forth in Section 12955(f) of the FEHA. This section requires that retaliation be the dominant reason in motivating the respondent to take the adverse action. "Dominant" means more than a "partial factor." Whether it means "sole" factor is an open question under the law (see DFEH v. Anderson (1979) FEHC Dec. No. 79-05, page 6).

retaliatory motive. If the respondent can show this by clear and convincing evidence, it may be able to deprive the complainant of all or part of his or her remedy. This is discussed in Section 16 of Chapter VII.)

c. Affirmative Defense Standards (Issue III)

Section 7287.8(b) of the regulations states that an employer may excuse its retaliatory actions if it can demonstrate:

- 1) That the complainant's protected activity was disruptive or detrimental to the respondent's legitimate business interests;  
and
- 2) That, even if the complainant's protected activity was disruptive or detrimental, the disciplinary steps taken against the complainant were reasonable responses in view of the appropriateness of the complainant's conduct.

Part 1 of Legal Standard: Disruptive or Detrimental Conduct

The Commission and courts applying similar federal law give little guidance as to what constitutes "disruptive" or "detrimental" conduct.

The uncertainty in this area arises from the fact that some conduct will appear from one perspective to be "opposition" but will also appear from another perspective to be "disruptive" or "detrimental." For example, an employee stands up at a regular, large staff meeting and verbally protests what she believes to be racially discriminatory hiring and pay practices of the employer. She harangues the person running the meeting, and he is unable to speak until she stops. This is clearly "opposition" but is also disruptive to the employer.

To determine whether a specific kind of "opposition" is sufficiently "disruptive" or "detrimental" to the respondent's business interests to establish an affirmative defense, we must always balance the rights of the complainant to be free from discrimination and retaliation and to assert those rights in an appropriate manner against the disruption to the respondent's legitimate business interests.

A range of situations that raise this problem exist. At one end are activities that probably will not be considered sufficiently disruptive or detrimental if they are carried out in an appropriate manner. At the other end are activities that clearly will be considered disruptive or detrimental:

Activities that probably will not be considered disruptive or detrimental:

- a. Use of any formal procedure designed to provide redress for the practice being opposed (e.g., union grievance). "Participation" in the FEHA complaint process will absolutely not qualify as "disruptive" or "detrimental."
- b. Any appeal to or protest in a public forum (e.g., letter to a newspaper, peaceful demonstration).
- c. Calling a supervisor a racist or any other verbal protest of a potentially inflammatory nature where the content of the protest

reflects the individual's beliefs that his rights under the Act were violated.

Activities that will qualify as disruptive or detrimental:

- a. Activities that are illegal.

For situations that fall between these categories, we must weigh and balance the rights of the complainant to seek redress from discrimination and to be free from retaliation for asserting her rights in an appropriate manner against the disruption to the respondent's legitimate business interests. Remember, because the Commission has stated that the Act should be broadly construed to protect individuals from retaliation, we can assume that the Commission will scrutinize closely any affirmative defense of this type raised by the respondent.

Part 2 of Legal Standard: Reasonableness of Disciplinary Action

Even if the respondent can demonstrate that the complainant's activity qualifies as "disruptive" or "detrimental," the respondent must also demonstrate that the disciplinary response it took against the complainant for this conduct is "reasonable." That is, if the respondent took too drastic a measure against the complainant, in view of the nature and appropriateness of the complainant's conduct, then the response is not "reasonable" and the affirmative defense is not met.

## B. Analysis of Retaliation Cases

Commission cases and other sources give guidance on how to organize and assess the various types of evidence needed to evaluate each disputed Issue. Each type of evidence should be represented by a relevant question. The analytical outline below contains lists of typical Issue and relevant questions which represent an organization for typical cases.

Because the law says there are multi-part legal standards, in places in the outline where the evidence is complicated enough, the Issue questions are broken down into their component parts, each representing a part of the legal standard. Keep in mind that each case is different and may require additional or different questions. Remember that a list of Issue and relevant questions is not a substitute for analytical thinking. Always ask what logically fits each case and what else logically should be considered.

## 1. Analytical Outline

### I. Jurisdiction

Did the complainant engage in protected activity?

- A. Does the complainant's activity qualify as opposition to practices prohibited by the Act?

Or

- B. Does the complainant's activity qualify as participation in any Department or Commission proceeding?

### II. Discrimination

Did the respondent retaliate against the complainant by taking the adverse action because the complainant engaged in protected activity?

Relevant Questions:

- A. Did the respondent know of the complainant's protected activity?
- B. Did the adverse action actually happen?
- C. Is the respondent's reason for the adverse action factually accurate?
- D. Does the respondent's treatment of similarly situated persons indicate that the adverse action was taken because of the complainant's protected activity?
1. What happened to others under the same decision-maker who did what the respondent claims the complainant did?
  2. What happened to others under the same decision-maker who engaged in protected activity?
- E. Does the respondent's timing of the adverse action indicate that it was taken because the complainant engaged in protected activity?
- F. Does the respondent's treatment of the complainant before and after the protected activity indicate that the adverse action was taken because of the complainant's protected activity?
- G. Is there any evidence that the complainant was "set up" because of the complainant's protected activity?
- H. Is there any direct evidence to link the adverse action to the complainant's protected activity?
- I. Is there any anecdotal evidence to link the adverse action to the complainant's protected activity?
- J. Other relevant questions?

III. Affirmative Defense

Was the complainant's activity so disruptive or detrimental to the respondent's legitimate business interests as to warrant the adverse action?

A. Was the complainant's activity disruptive or detrimental to the respondent's legitimate business interests?

B. If the complainant's activity was disruptive or detrimental, were the disciplinary steps taken by the respondent reasonable responses in view of the appropriateness of the complainant's conduct?

IV. Remedy

What remedy is proper?

## 2. Explanation of Analytical Outline

### I. Jurisdiction

#### Did the complainant engage in protected activity?

In addition to the usual jurisdictional requirements, in order for the Department and Commission to have jurisdiction in a retaliation case, the complainant's conduct must qualify as one of two forms of "protected activity": "opposition" or "participation." The above question then simply states the Issue in terms of the legal standard for jurisdiction by asking whether the complainant's conduct qualified as "protected activity" under the FEHA. The Issue question is broken down below into two parts, each representing one of the categories of "protected activity."

NOTE: A "yes" answer to only one of the questions below is necessary for jurisdiction. On the other hand, if the answers to both questions below are no (the complainant's activities do not qualify as "protected activities") then the Department will not have jurisdiction, and there is no point in proceeding.

#### A. Does the complainant's activity qualify as opposition to practices prohibited by the Act?

This part of the Issue question asks whether the complainant's activity meets the legal criteria for "opposition" to practices forbidden by the Act. The FEHA broadly protects most forms of opposition to or protests against unlawful employment discrimination. Although the exact boundaries of "opposition" are somewhat undefined, the Commission regulations and other sources do give some general rules about what will qualify as "opposition": 1) the "practices" opposed must either exist or reasonably be believed to exist and need not be unlawful under the Act in fact as long as the complainant reasonably believes that they are unlawful; 2) "opposition" may be actual or perceived by the respondent, regardless of the intention of the person expressing the opposition; 3) general protests against discrimination-related, broad societal practices are covered; the practices opposed need not be specific. See section A.2.a. "Discussion of the Legal Standards," "Jurisdiction Standards," in this Section and Section 7287.8 of the Commission regulations for specific examples and more detail as to what constitutes "opposition."

Or

#### B. Does the complainant's activity qualify as participation in any Department or Commission proceeding?

This part of the Issue question, which is separate from A above, asks whether the complainant's activity meets the legal criteria for "participation", the second category of "protected activity."

"Participation" generally refers to involvement with the FEHA's complaint process. Filing complaints with or access to other agencies is considered "opposition." The FEHA broadly protects all participation in or access to the FEHA's complaint process. To be protected, however, the activity must be based on a good

faith belief that the Act has been violated. "Participation" includes filing a complaint, contacting, testifying, assisting, or participating in any manner in an investigation, proceeding, or hearing conducted by the Department or Commission or their staffs, regardless of whether a complaint is filed or whether it is ultimately sustained. See section A.2.a. "Discussion of the Legal Standards," "Jurisdiction Standards," in this Section and Section 7287.8 of the Commission regulations for more examples and further detail as to what constitutes "participation."

## II. Discrimination

Did the respondent retaliate against the complainant by taking the adverse action because the complainant engaged in protected activity?

The legal standard for Issue II in retaliation cases asks whether there is a causal link or connection between the "protected activity" and the adverse action. The above question then states the Issue in terms of the legal standard by asking whether the adverse action occurred because of the complainant's "protected activity." The respondent will typically deny this causal connection and the relevant questions for this Issue will therefore focus mainly on this disputed aspect of the case.

NOTE: If retaliation was a factor (that is, even if it was only one of several factors) in motivating the respondent to take the adverse action, this will be sufficient to prove the causal connection.

Relevant Questions:

A. Did the respondent know of the complainant's protected activity?

The evidence under this relevant question looks at one element necessary to show the causal connection between the complainant's protected activity and the adverse action: that is, knowledge by the respondent of the complainant's protected activity. If the respondent or agents of the respondent who made the decision to take the adverse action against the complainant had no knowledge of the complainant's protected activity, then it would not be possible to conclude that the decision-maker was motivated to take the adverse action because of the complainant's protected activity. Therefore, if the respondent had no knowledge of the complainant's protected activity, there is no point in proceeding since we could not show the requisite causal connection. On the other hand, if the respondent did have knowledge, proceed to the next relevant question.

B. Did the adverse action actually happen?

In few cases, the respondent may dispute that the adverse action (the termination or other harm) actually occurred. Use this relevant question to address such a dispute. (See relevant question A on the Analytical Outline for Termination Cases or on the Analytical Outline for Selection Cases, Section 1 of Chapter VII.)

C. Is the respondent's reason for the adverse action factually accurate?

Just as in standard termination cases, the respondent will usually deny that the adverse action was taken because of the complainant's engaging in protected activity and asserts instead a rebuttal: a claim that some other non-discriminatory reason caused the action to be taken. The investigation should identify each such rebuttal reason and check its accuracy. For example, if the respondent claims that the complainant was fired for making mistakes, check whether the complainant did in fact make mistakes. (See relevant question B on the Analytical Outline for Termination Cases, Section 1 of Chapter VII, for additional discussion.)

D. Does the respondent's treatment of similarly situated persons indicate that the adverse action was taken because of the complainant's protected activity?

The evidence under this relevant question looks at the respondent's treatment of other groups of similarly situated persons. From this evidence, we can draw an inference about the respondent's motives for its treatment of the complainant. Two very distinct groups of similarly situated persons should be examined:

1. What happened to others under the same decision-maker who did what the respondent claims the complainant did?

The respondent's rebuttal usually claims that the complainant was terminated (or that some other adverse action was taken) because the complainant did something (e.g., was excessively absent, did poor work) that warrants termination. This segment of evidence involves the respondent's treatment of other persons who did the same or similar thing. If these persons did not engage in "protected activity" and are under the authority of the same decision-maker who terminated the complainant, their treatment by the respondent will permit us to infer much about the respondent's motives for its treatment of complainant. Evidence that these persons were not terminated tends to demonstrate that the complainant was terminated because she engaged in "protected activity." Evidence that these persons were also terminated, on the other hand, tends to demonstrate that the complainant was terminated because of the non-discriminatory reason that respondent asserts.

As with any disparate treatment evidence, approach this evidence in two steps:

- a. Determine who made the decision to terminate the complainant and whether the decision-maker had knowledge of the complainant's "protected activity" or whether the respondent or its other agents who did have knowledge had an influence on the decision. (The evidence under relevant question II.A above will also be relevant here.)  
If the decision-maker had no knowledge of the complainant's "protected activity," and was not influenced by others who had knowledge, there is no need to examine

the treatment of similarly situated persons since we could not infer from that comparison that the decision-maker adversely acted toward the complainant as he did because the complainant engaged in "protected activity" and the other persons did not. If the decision-maker did have knowledge of the complainant's "protected activity" or was influenced by someone who did, decide who is similarly situated by determining what, if any, persons are subject to the same decision-making authority as the complainant.

Then determine which of those persons committed the same or a similar infraction (according to the respondent's work rules) as the complainant.

- b. Examine next how the respondent treated these similarly situated persons. Ask whether these persons were given the same disciplinary treatment as the complainant or whether a less adverse action or no action was taken. (See relevant question C on the Analytical Outline for Termination Cases, Section 1 of Chapter VII, for additional discussion.)

2. What happened to others under the same decision-maker who engaged in protected activity?

A second group of similarly situated persons consists of other persons who, like the complainant, have engaged in "protected activity." If these people were also terminated or adversely treated, by the same person who terminated the complainant, that tends to indicate that the complainant was so treated because of her "protected activity." If, however, the respondent did not take reprisals against others who also engaged in "protected activity," this fact would not necessarily rule out that the respondent may still have taken the adverse action against the complainant because the complainant engaged in "protected activity."

E. Does the respondent's timing of the adverse action indicate that it was taken because the complainant engaged in protected activity?

This question focuses on the timing of the adverse action in relationship to the respondent's learning of the complainant's "protected activity." If the adverse action occurred very shortly after the respondent gained knowledge of the complainant's protected activity, a strong inference of a retaliatory motive may be drawn. The strength of the inference depends on the proximity in time of the two events.

NOTE: While disparate treatment evidence (see relevant question D above) is often the most powerful evidence in standard termination cases, in retaliation cases, timing evidence may be equal or more powerful evidence and may outweigh a showing of little or no disparate treatment.

F. Does the respondent's treatment of the complainant before and after the protected activity indicate that the adverse action was taken because of the complainant's protected activity?

This question focuses on the respondent's treatment of the complainant before and after the respondent learned of the complainant's "protected activity." When did the respondent learn of the complainant's activity? Did the respondent treat the complainant differently before or after? What was the nature of the complainant's work record before and after the respondent learned of the activity? Was the complainant put under surveillance? If there is a difference in treatment or a change in the complainant's work record, is there a non-discriminatory reason for the difference or change? If there is a change in treatment and no non-discriminatory explanation, then a strong inference of a retaliatory motive may be drawn.

- G. Is there any evidence that the complainant was "set up" because of the complainant's protected activity?

This question asks whether the respondent pre-arranged a situation that would justify its taking the adverse action against the complainant so that it could accomplish its purpose of retaliation more easily. For example, a Black employee, who filed a complaint alleging a discriminatory termination, is reinstated as the result of a settlement. Before the Complainant returns to work, the Respondent institutes a new policy setting a higher standard for a particular job task. The Respondent knows that the Complainant previously had some difficulty with this aspect of his or her job. After reinstatement, the Complainant continues to have difficulty with this job task and, under the higher standard, is terminated for poor performance. A supervisor tells another employee that the Respondent deliberately set the higher standard in order to get rid of the Complainant. Although a "set up" situation may be hard to prove, always check for this type of evidence.

- H. Is there any direct evidence to link the adverse action to the complainant's protected activity?

Direct evidence demonstrates the answer to the Issue question (i.e., the causal connection) directly. For example, a supervisor's statement that he or she terminated the complainant because the complainant complained to him about sex discrimination in job assignments demonstrates the causal connection directly. Always check for this very powerful evidence, even though you may not find it very often.

- I. Is there any anecdotal evidence to link the adverse action to the complainant's protected activity?

Anecdotal evidence about particular events or conduct may demonstrate that the respondent's agent who made the decision to take the adverse action against the complainant was biased against the complainant because of his or her "protected activity." Approach this evidence in two steps: First, make sure that the supervisor or manager to whom the evidence applies played some role in the decision to take the adverse action against the complainant. Second, determine whether the claimed events (the remarks, conduct, etc.) really occurred and whether they do in fact show bias against the complainant because of his or her "protected activity."

J. Other relevant questions?

This question addresses itself to any other type of evidence from which we could infer a retaliatory motive. Remember that the relevant questions above represent the most typical or common types of evidence that should be considered and are not the only questions that could be asked. Always ask what logically fits each individual case and what else logically should be considered.

III. Affirmative Defense

Was the complainant's activity so disruptive or detrimental to the respondent's legitimate business interests as to warrant the adverse action?

The respondent may excuse its retaliatory actions if it can demonstrate:

- A. That the complainant's protected activity was disruptive or detrimental to the respondent's legitimate business interests; and
- B. That even if the complainant's protected activity was disruptive or detrimental, the disciplinary steps taken against the complainant were reasonable responses in view of the appropriateness of the complainant's conduct.

The above question then simply states Issue III in terms of the multi-part legal standard for this affirmative defense by asking whether the complainant's conduct was so disruptive as to warrant the adverse action. The Issue question is broken down below into two questions, each representing a part of the multi-part legal standard.

NOTE: "Yes" answers to both of the questions below are necessary for the respondent to meet this affirmative defense.

- A. Was the complainant's activity disruptive or detrimental to the respondent's legitimate business interests?

This question represents part 1 of the legal standard for this affirmative defense and asks whether the complainant's conduct qualifies as "disruptive or detrimental."

The Commission and other legal sources give us little guidance as to what constitutes "disruptive" or "detrimental" conduct. The uncertainty in this area arises from the fact that what may appear to be "opposition" from one perspective may also appear from another perspective to be "disruptive" or "detrimental." Despite this uncertainty, there are activities that most probably will not be considered disruptive or detrimental when they are carried out in an appropriate manner; for example, use of any formal procedure designed to provide redress for the practice being opposed (e.g., union grievance). Also, "participation" in the FEHA complaint process will absolutely not be considered disruptive or detrimental. Activities that are illegal, on the other hand, will qualify as disruptive or detrimental.

Since there are other situations that will fall between the above examples, we must always weigh the rights of the complainant to be

free from discrimination and retaliation and to assert his or her rights in an appropriate manner against the disruption to the respondent's legitimate business interests. Remember, because the Commission has stated that the Act should be broadly construed to protect individuals from retaliation, we can assume that the Commission will scrutinize closely any affirmative defense of this type raised by the respondent. (For further discussion of the legal standards for this question and for more examples of what will or will not qualify as "disruptive" or "detrimental," see Section A.2.c. of this Section, "Discussion of the Legal Standards," "Affirmative Defense Standards.")

AND

- B. If the complainant's activity was disruptive or detrimental, were the disciplinary steps taken by the respondent reasonable responses in view of the appropriateness of the complainant's conduct?

This question represents part 2 of the legal standard for the affirmative defense and asks whether the respondent's disciplinary response is "reasonable." Even if the respondent can demonstrate that the complainant's activity qualifies as "disruptive" or "detrimental," the respondent must also demonstrate that the disciplinary response it took against the complainant for this conduct is "reasonable." That is, if the respondent took too drastic a measure against the complainant in view of the appropriateness of the complainant's conduct, then the response is not "reasonable" and the affirmative defense is not met.

One way to test the "reasonableness" of the respondent's disciplinary response is to compare the discipline given to others for similar infractions to that given to the complainant.

C. The Law: Sources of the Legal Standards for Retaliation Cases

1. Statute and Regulations

FEHA (Government Code) Sections 12940(e) and (f)

Commission Regulations Section 7287.8

2. Precedential Decisions

DFEH v. RAH Industries (Lindsey) FEHC Dec. No. 80-12. Retaliation for filing physical handicap complaint with DFEH - termination (welder). Though Complainant eventually would have been terminated, violation established by showing Complainant terminated earlier than planned, immediately following filing of DFEH complaint, pages 6-7.

DFEH v. Sonoma County Office of Education (Hansen) FEHC Dec. No. 80-25. Sex (female) and retaliation for filing DFEH complaint - failure to promote to processing and distribution supervisor. Decision-maker's persistent questioning of Complainant constituted retaliation, pages 13-14.

DFEH v. Rayne Water Conditioning (Miller) FEHC Dec. No. 82-03. Retaliation for filing sex discrimination complaint with DFEH - termination (salesperson). Complainant terminated the day Respondent received DFEH complaint; witnesses refuted Respondent's assertion that Complainant voluntarily quit, pages 8-11.

DFEH v. City of Vista, Parks and Recreation Department (Hermosillo) FEHC Dec. No. 83-03. Retaliation for filing national origin complaint with DFEH - different treatment. DFEH failed to establish causal connection, pages 8-13.

DFEH v. Northrup Services, Inc. (Hand) FEHC Dec. No. 83-11. Retaliation for filing age discrimination complaint with DFEH - layoff and failure to recall (secretary). Lack of credibility in Respondent's reason for layoff, pages 8-9.

DFEH v. Dyna-Med, Inc. (Olander) FEHC Dec. No. 88-03 [March 11, 1988 Reissue of FEHC Dec. No. 82-14]. Retaliation for filing DFEH sex discrimination complaint - termination (managing editor). Timing of termination; inability to sustain claim of poor performance, pages 11-17.

DFEH v. California State University, Hayward and Robert DeLemos, Individually (House) FEHC Dec. No. 88-18. Sex (female) and retaliation for objecting to sexual harassment by supervisor - rejection on probation (supervising custodian). Key decision-maker not the harasser; evidence of unsatisfactory performance on probation, pages 20-22.

3. Court Decisions on Commission Cases

Dyna-Med, Inc. v. Fair Employment and Housing Commission (1987) 43 Cal.3d 1379. Held that Commission did not have authority to award punitive damages.